Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer	)	MB Docket No. 07-29
Protection and Competition Act of 1992	)	
	)	
Development of Competition and Diversity	)	
In Video Programming Distribution:	)	
Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access	)	MB Docket No. 07-198
Rules and Examination of Programming Tying	)	
Arrangements	)	

COMMENTS OF CABLEVISION SYSTEMS CORP.

Michael Olsen
Vice President - Legal Regulatory Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Ernest C. Cooper
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

January 4, 2008

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 07-29
	)	
Development of Competition and Diversity In Video Programming Distribution: Section 628(c)(5) of the Communications Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	
	)	
Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)	MB Docket No. 07-198

COMMENTS OF CABLEVISION SYSTEMS CORP.

INTRODUCTION AND SUMMARY

Competition among video programming providers in local markets around the country is highly dynamic and variable. AT&T and Verizon are potent players in video distribution in a growing number of local markets around the country, and consumers nationwide have access to DirecTV and EchoStar in addition to their local cable operator. Given this variability in the level of video distribution competition around the country, a monolithic national snapshot of video competition taken every five years does not satisfy Congress's directive to limit the exclusivity ban only to circumstances in which it is "necessary to preserve and protect competition."

This exacting standard and the First Amendment require that the assessment of whether the ban is necessary be performed with some granularity, to ensure against overbreadth. The Commission must therefore adopt its proposal to provide cable operators an opportunity to demonstrate that the exclusivity ban is no longer necessary in particular local markets as a result of competition from telephone companies and direct broadcast satellite (DBS). Assessing whether local market conditions warrant retention of the legacy prohibition on cable exclusivity also would be consistent with the Commission's recent modifications to the newspaper-broadcast cross-ownership restriction.

Specifically, any cable operator that can demonstrate it faces durable and substantial competition from other video providers -- DBS and either AT&T or Verizon -- in a Designated Market Area (DMA) should no longer be subject to the exclusivity ban in that area. Even in markets where such showings are made, cable exclusivity arrangements could still be challenged under the "unfair competition" prong of the program access rules, but the burden of proof would be on the complainant to demonstrate that the challenged arrangement causes competitive harm.

While the Commission must narrowly tailor the exclusivity ban, it lacks the authority to expand the program access rules to terrestrial programming generally or terrestrially-delivered high-definition (HD) programming in particular. The Commission itself has repeatedly ruled that Congress limited application of section 628 to satellite cable programming, and that terrestrially-delivered programming does not come within the ambit of the program access rules. There is no basis for the Commission to reverse this long-standing position. The clear statutory language limiting the applicability of the program access rules to satellite-delivered programming also precludes the Commission from subjecting terrestrially-delivered HD programming to those rules even if the same or similar programming in standard definition (SD) or analog format is delivered by satellite.

Finally, the Commission should examine abuses of the retransmission consent process by broadcasters and consider steps to redress these abuses.

I. SECTION 628 REQUIRES THAT THE COMMISSION ESTABLISH A MORE GRANULAR TEST THAT ENABLES CABLE OPERATORS TO SEEK RELIEF FROM THE EXCLUSIVITY BAN IN COMPETITIVE MARKETS

Competition in today's video market is intense, dynamic, but geographically variable. In some markets, like the New York DMA, there are several wireline video competitors, satellite providers, and satellite master antenna television (SMATV) and other operators all offering head-to-head video services in direct competition. In other markets video competition is less developed. Given this variability in the level of video distribution competition around the country, a national snapshot of video competition taken every five years does not satisfy Congress's directive to limit the exclusivity ban only to circumstances in which it is "necessary to preserve and protect competition."[1/] Rather, the statutory standard and the First Amendment require that the assessment of whether the ban is necessary be performed with some granularity, to ensure against overbreadth.

To satisfy these mandates, the Commission must adopt its proposal to provide cable operators an opportunity to demonstrate that the exclusivity ban is no longer necessary in particular local markets as a result of competition from telephone companies and DBS.[2/] Specifically, any cable operator that can demonstrate that it faces durable and substantial competition from other video providers -- DBS and either AT&T or Verizon -- in a DMA should no longer be subject to the exclusivity ban in that area. In DMAs where such showings are made, competing multichannel video programming distributors (MVPDs) would still have the option to challenge specific exclusive arrangements if they prove anticompetitive, under the

---

1/ 47 U.S.C. § 548(c)(5).

2/ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No.

"unfair practices" provision of section 628(b), but the burden would be on the complainant to demonstrate that the challenged arrangement impairs competition in that DMA.

A. The Statutory Standard Applicable To The Exclusivity Ban Requires The Establishment Of A Mechanism For Lifting The Exclusivity Ban In Competitive Local Markets.

Section 628(c)(5) of the Communications Act provides that the Commission may apply the ban on exclusive program distribution contracts only to the extent the ban is "necessary to preserve and protect competition and diversity in the distribution of video programming."[3/] Section 628 generally, and the ban on exclusive contracts in particular, limits the rights of content owners by requiring them to share certain of their programming assets with any requesting video distributor. In the context of other government-imposed asset-sharing arrangements, courts and the Commission have emphasized that such requirements are appropriate only in circumstances in which they are found to be a competitive necessity based upon a detailed examination of specific local market conditions.

Thus, for example, in determining the circumstances under which Verizon, AT&T and other incumbent local exchange carriers must share unbundled network elements with competitors, the FCC has stated that such sharing obligations can be triggered only if a "granular analysis" of local market conditions shows that competition will be impaired absent the provision of unbundled network elements to competitors.[4/] Likewise, the availability of a

---

07-29, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd. 17791, ¶ 114 (2007) ("*2007 Extension Order & NPRM*").

3/ 47 U.S.C. § 548(c)(5).

4/ *See, e.g.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 18 FCC Rcd. 16978, ¶ 118 (2003) ("*Triennial Review Order*") (citing *United States Telecom Ass'n v. FCC,* 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*")) (subsequent history omitted); *Unbundled Access to Network Elements*, WC Docket No. 04-313, 20 FCC Rcd. 2533, ¶ 8 (2005) ("*Triennial Review Remand Order*") (noting *USTA I* rejected national sharing obligations because they were "insufficiently 'granular'" and "did not market-specific exemption from the exclusivity ban would ensure that it is not imposed in any local market where it is not a competitive necessity[5/] and would more closely hew to the standard in section 628.[6/] More recently, the Commission recognized that the application of media cross-ownership rules must be differentiated based on market characteristics and that proscriptions based on an assumed lack of competition cannot be sustained nationwide.[7/]

The First Amendment rights of cable operators and programmers require that the Commission apply the exclusivity ban with more precision.[8/] The First Amendment demands that the exclusivity ban be narrowly tailored[9/] to address harms that are "real, not merely conjectural" and "alleviate these harms in a direct and material way."[10/] The First Amendment

---

account for differences in particular markets and particular customer classes"), *aff'd Covad Commc'ns Co. v. FCC*, 450 F.3d. 528, 544 (D.C. Cir. 2006) (noting that that "*USTA I* and *USTA II* require a nuanced application of a 'granular' impairment standard, which incorporates competitive variations within and across markets").

5/ *See 2007 Extension Order & NPRM* ¶ 13 (exclusivity ban can be retained only if, "in the absence of the prohibition, competition and diversity in the distribution of video programming would not be preserved and protected").

6/ *Cf. id.* (noting that some courts have interpreted the term "necessary" to mean "indispensable" or "essential").

7/ *Cf. 2006 Quadrennial Media Ownership Review*, MB Docket 06-121, Press Statement of Chairman Kevin Martin, December 18, 2007 at 2-3 ("We cannot ignore the fact that the media marketplace is considerably different than it was when the newspaper/broadcast cross-ownership rule was put in place more than thirty years ago. . . . Today's Order amends the 32-year absolute ban on newspaper-broadcast cross-ownership. . . . This relatively minor loosening of the ban in markets where there are many voices and sufficient competition will help strike a balance . . . .").

8/ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*") ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of speech and press provisions of the First Amendment.") (citing *Leathers v. Medlock*, 499 U.S. 439, 444 (1991)).

9/ The First Amendment requires that any restriction on speech must be "narrowly tailored" to advance the goal of competition without unnecessarily sweeping within its purview arrangements and program networks that pose no likelihood of imperiling that goal. *See Turner I*, 512 U.S. at 680.

10/ *Turner I*, 512 U.S. at 664. *See also Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*").

implications of the exclusivity ban increase the burden on the Commission to show that the ban is truly specific to addressing a real and measurable harm, based on specific evidence.[11/]

In today's competitive video marketplace, the availability of such a granular assessment of "necessity" is long overdue. Indeed, the marketplace has evolved substantially since 1992, when the ban was first imposed, and even from 2002, when it was first extended. In many local markets around the country, incumbent cable operators face competition from at least three powerful competitors: DirecTV, EchoStar and either Verizon or AT&T. In these areas, MVPD subscribers now have a choice of four or more different video programming distributors, thereby calling into question the continued need for the exclusivity ban to ensure competition in such areas. Nonetheless, the exclusivity ban in its current form treats "video competition" across the nation as static and uniform, and presumes that a cable operator facing local market competition from DBS and local telephone companies could use exclusivity to drive DirecTV, EchoStar, and either Verizon or AT&T from the marketplace.

In the face of the vigorous and durable competition from these providers in many local markets, there is no justification for maintaining such a presumption in every case.[12/] Nationally, DirecTV is the second largest MVPD in the country, and EchoStar is the fourth largest. AT&T and Verizon clearly have the intention and means to be competitors for the long-haul. Their

---

11/ *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1041 (D.C. Cir. 2002) ("[F]irst amendment 'intermediate scrutiny' . . . is more demanding than the arbitrary and capricious standard of the APA."); *Time Warner II*, 240 F.3d at 1137 ("[T]o pass even the arbitrary and capricious standard, the agency must at least reveal a rational connection between the facts found and the choice made. Here the FCC must also meet First Amendment intermediate scrutiny.") (internal quotation marks and internal citations omitted).

12/ *Cf. 2006 Quadrennial Media Ownership Review*, MB Docket 06-121, Press Statement of Chairman Kevin Martin, December 18, 2007 at 2-3 ("We cannot ignore the fact that the media marketplace is considerably different than it was when the newspaper/broadcast cross-ownership rule was put in place more than thirty years ago. . . . Today's Order amends the 32-year absolute financial strength, ubiquitous networks in the areas they serve, national economies of scale and scope, and long-standing relationship with the tens of millions of households receiving their telephone and wireless services make them formidable competitors in any local market that they choose to enter.

In many local markets, these distributors have a mature, entrenched competitive presence. In the rapidly growing number of local markets where Verizon and AT&T have deployed competitive video distribution platforms, they have brought substantial resources to bear -- typically far more than the "incumbent" cable operator that is required to aid its competitors through the forced sharing of program access. For example, Verizon and AT&T -- which both compete with Cablevision in the New York DMA -- enjoy a combined market capitalization exceeding $360 billion, over 40 times larger than Cablevision. In their most recent quarters, Verizon earned $24 billion in revenues and AT&T $30 billion and reported year-to-date operating cash flow -- available to fund further expansion -- of $18 billion and $24.2 billion respectively.[13/]

The intensity of video competition in certain local markets is impacting cable's market share nationally. In this very proceeding, the Commission has acknowledged that, in the last five years, cable's share of the marketplace has declined, DBS penetration has increased by 67%, and that "the emergence of video services offered by telephone companies" is a "significant

---

ban on newspaper-broadcast cross-ownership. . . . This relatively minor loosening of the ban in markets where there are many voices and sufficient competition will help strike a balance . . . .").

13/ *See* Press Release, Verizon, Verizon Reports Continued Success in 3Q 2007 (Oct. 29, 2007) (*available at* http://newscenter.verizon.com/); Press Release, AT&T Inc., *AT&T Delivers Strong Third Quarter Results; Growth Highlighted by Robust Wireless Gains, Advances in Enterprise Services, Accelerated TV Ramp* (Oct. 23, 2007) (*available at* http://www.att.com/gen/landing-pages?pid=6080).

development" for MVPD competition.[14/] The changes occurring at the national level -- significant in and of themselves -- reflect an aggregate of competition in many local markets that is far more intensive and entrenched than even these numbers show. The local market dynamics that are driving the national competitive trends call for the establishment of a mechanism that permits a granular analysis of local market conditions so that the blanket prohibition on exclusivity can be removed in areas where competition has taken firm root.

In this very proceeding, the Commission itself has noted that the need for the exclusivity ban diminishes as "competition in the MVPD market continues to develop and cable market share continue to decline."[15/] Permitting exclusive arrangements in local markets with durable competition would promote consumer welfare by encouraging innovation and investment in programming and allowing for product differentiation among distributors, just as such arrangements do in almost every other segment of the economy in general and the communications services market in particular.[16/] The costs of the exclusivity prohibition -- which include less product differentiation among competitors, lower levels of investment in programming by cable, DBS and the telcos, and reduced innovation -- are substantial,[17/] and should not continue to be borne in local markets where competition from DBS and the telephone companies is flourishing.

14/ *2007 Extension Order & NPRM* ¶¶ 23 - 24.

15/ *See id.* ¶ 60.

16/ *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, MB Docket No. 07-29, Comments of Cablevision Systems Corporation, at 8-9 & n.25 (filed April 2, 2007) ("Cablevision Comments"); *id.* at 28-30; *2007 Extension Order & NPRM* ¶ 63.

17/ *See* Cablevision Comments at 28-30; *2007 Extension Order & NPRM* ¶ 63.

Cablevision is keenly aware that competition is stronger in some markets than in others. Most of the company's network footprint in Connecticut, New York and New Jersey overlaps with either AT&T or Verizon's video-ready network, and industry observers and financial analysts have noted that the telephone companies already are offering substantial competition in markets served by Cablevision.[18/] In New York, Verizon "has been going head-to-head with Cablevision since the telecommunications company launched TV service locally" in 2005,[19/] and has been heavily promoting its FiOS TV service on Long Island and in Westchester and Rockland counties.[20/]

In New Jersey, Verizon's FiOS TV service is available to over 1 million homes and businesses.[21/] Verizon has stated that "[t]housands of consumers are signing up each week for FiOS TV," that its "customer service representatives have been working constantly, taking orders

---

18/ *Verizon: 150 HD Channels in '08*, BROADCASTING AND CABLE, Nov. 5, 2007 ("The FIOS service overlap for most cable operators is marginal save that of Cablevision, where it covers 30% of the cable company's footprint."); *Cablevision result compounds woes*, FINANCIAL TIMES, Nov. 9, 2007 ("Cablevision . . . is facing particular competition for customers from Verizon, which covers about 90 percent of the area that Cablevision does."); *Dolans Down for Now, but Not Out*, BROADCASTING AND CABLE, Oct. 29, 2007 ("[I]nvestors still aren't comfortable with the increased competition in [cable], especially in Cablevision's footprint where Verizon is making an aggressive push with its FiOS TV."); *Dolans Plans Dashed Again*, DAILY VARIETY, Oct. 25, 2007 ("'They have much more vulnerability to Verizon than other cable operators,' said Thomas Lee, an analyst with Oppenheimer & Co. About 90% of Cablevision's potential footprint -- *i.e.* the area in which it can sign up homes -- overlaps with Verizon's.").

19/ Richard J. Dalton, *Verizon to place local ads on FiOS,* NEWSDAY, Feb. 21, 2007, at A38; David Lieberman, *Verizon, Cablevision skirmish as war nears, New Services offered in fight for customers*, USA TODAY, Aug. 24, 2006, at 1B. *See also* Alice Z. Cuneo, *Telcos, cable trade bruising barbs in spots*, ADVERTISING AGE, Sept. 11, 2006, at 3.

20/ Allan Drury, *Verizon Beats Earnings Expectations,* THE JOURNAL NEWS, Oct. 30, 2007, at 8C; Amanda Fung, *Verizon strikes back at its rivals*, CRAIN'S NEW YORK BUSINESS, June 5, 2006, at 1.

21/ Martha McKay, *FiOS Available to 1 Million Homes, Offices; Verizon Plans to Add 400,000 Next Year*, THE RECORD, Nov. 9, 2007 (reporting that Verizon's FiOS TV service is available to one million homes and businesses in New Jersey with the expectation that the service would be available to another 400,000 next year).

from consumers," and "[p]eople are lining up at cable company offices to return their set-top boxes."[22] Last month, Verizon boasted that "New Jersey is now among the most-fibered states in the nation" and the company has added "more video customers [in New Jersey] faster than any other state" in which Verizon operates.[23] After only a year of service in the State, Verizon is providing FiOS TV to nearly 70% of the 179 New Jersey franchise areas served by Cablevision.[24]

---

[22] Press Release, Verizon, New Jersey Consumers Have More Reasons to Celebrate: Verizon Expands Availability of its Superior Television and Internet Service in Mercer County, Bringing Statewide Total to 180 Communities (Mar. 28, 2007) (*available at*: http://newscenter.verizon.com/).

[23] Press Release, Verizon, New Jersey Dazzled by the Light: Verizon's FiOS All-Fiber Optic Network Now Passes More than 1 Million Homes and Businesses in the State (Nov. 8, 2007) (*available at*: http://newscenter.verizon.com/); Martha McKay, *Verizon's Fiber-optics Network Growing Across New Jersey*, THE RECORD, Nov. 9, 2007 (quoting William Foshay, Senior Vice President and General Manager of Verizon). *See also* Tom Johnson, *Verizon Wired about Fiber Optic Work*, NEWARK STAR-LEDGER, Nov. 9, 2007 (noting Verizon has signed up 90,000 video customers).

[24] Press Release, Verizon, TV as You've Never Seen It Before: Verizon Launches FiOS TV in 106 New Jersey Communities (Jan. 11, 2007) (*available at*: http://newscenter.verizon.com/); Press Release, Verizon, Verizon's New High-Fiber "Diet" for 24 Additional New Jersey Communities: Blazing-Fast Data, Crystal Clear Voice and Video Capability (Mar. 15, 2007) (*available at*: http://newscenter.verizon.com/); Press Release, Verizon, Great News for New Jersey Consumers: Verizon Increases Availability of Its TV Service by Nearly 60 Percent in State (Mar. 1, 2007) (*available at*: http://newscenter.verizon.com/); Press Release, Verizon, New Jersey Consumers Have More Reasons to Celebrate: Verizon Expands Availability of Its Superior Television and Internet Service in Mercer County, Bring Statewide Total to 180 Communities (Mar. 28, 2007) (*available at*: http://newscenter.verizon.com/); Press Release, Verizon, A Time for Consumers to Celebrate: Verizon's FiOS TV Arrives in 16 Additional New Jersey Communities (June 5, 2007) (*available at*: http://newscenter.verizon.com/); Press Release, Verizon, Great News for New Jerseyans Seeking a Better Alternative to Cable TV: Verizon's Breathtaking FiOS TV Is Now Available in 24 Additional Garden State Communities (Sept. 12, 2007) (*available at*: http://newscenter.verizon.com/).

In Connecticut, AT&T already offers its U-Verse video service to more than half the 16 communities served by Cablevision in southeastern Connecticut.[25/] AT&T has indicated that it plans to spend about $336 million on infrastructure improvements in Connecticut and that every day AT&T is "adding more fiber" in the state.[26/] Since its introduction last year, AT&T's U-Verse service has achieved an 11% penetration rate in markets where it is offered.[27/]

Given the level of sunk investment in video already expended by Verizon and AT&T and the companies' repeated assurances to investors and regulators about their long-term commitment to video,[28/] there is no basis for continuing to presume that more content competition, or exclusivity for cable-owned programming, could derail the vigorous competition they are bringing to the markets they are entering.[29/] The scale and scope of AT&T and Verizon's network and financial resources, the levels of capital they have already committed to

---

25/ *See DPUC Review of AT&T Connecticut's Community Access Funding Obligations*, Docket No. 07-05-23, Written Comments of The Southern New England Telephone Company d/b/a AT&T Connecticut, at 2 (filed Aug. 13, 2007).

26/ Pam Dawkins, *AT&T Building U-Verse*, CONNECTICUT POST ONLINE, Aug. 23, 2007.

27/ Randall Stevenson, AT&T Chairman & CEO, Remarks at AT&T Investor Call, (Dec. 11, 2007) (http://www.att.com/gen/investor-relations?pid=10872) ("Stevenson Remarks").

28/ *See TV Dominates a Telco Stage*, BROADCASTING & CABLE, June 25, 2007 (noting AT&T's plan to serve 18 million homes by the end of 2008); Press Release, AT&T Inc., AT&T Outlines Growth Strategies, Affirms Outlook for Sustained Double-Digit Growth in Adjusted Earnings Per Share (Dec. 11, 2007) (*available at* http://www.att.com/gen/landing-pages?pid=6080) (projecting 30 million homes passed by 2010); *US group is firing on all cylinders*, FINANCIAL TIMES, June 25, 2007 (noting Verizon expects to pass 18 million households by year-end 2008). *See also* Stevenson Remarks ("This decade, it's TV. We know how to do this. . . . We think this is a really big opportunity for AT&T. . . . This is a once in a decade emerging opportunity, just like wireless emerged in the 80s and broadband in the '90s to build the next billion-dollar business").

29/ In Cablevision's case, the likelihood of being able to profitably foreclose competition through anticompetitive exclusive arrangements is particularly remote. In contrast to other vertically-integrated cable companies -- as well as DirecTV and EchoStar -- Cablevision's subscriber base is relatively small and its geographic footprint is highly concentrated. The Commission has implicitly recognized that a cable operator's ability to use exclusivity to successfully foreclose competition diminishes in proportion to its size.

the video business, and their pre-existing relationships with each home passed by their video networks render them a competitor of unparalleled strength and staying power in any local market in which they enter.

The breadth and diversity of the programming available to distributors also belies any presumption that a cable operator could use program exclusivity to dislodge DBS or a local telephone company from any local market in which they choose to offer video. Nearly eighty percent of all programming networks are unaffiliated with cable operators and fewer than one in three of the top 20 networks are vertically integrated with cable.[30/] All four of cable's chief competitors carry hundreds of programming networks (the great majority of which are not affiliated with cable and all of which are typically governed by multi-year contracts) and each has the financial strength and resources to develop its own programming and enter into exclusive arrangements itself.

B. The Commission Should Allow Cable Operators To Petition For Relief From The Exclusivity Ban In Markets Where Competition Has Taken Firm Root.

Given the dynamism and variability of competition in local markets around the country, the Commission should establish a petition mechanism that will permit any cable operator to demonstrate that it faces durable competition from DBS and AT&T or Verizon in a DMA served by that operator such that continuation of the exclusivity ban in that market is therefore no longer "necessary to preserve and protect competition."

Adopting this mechanism will not eliminate ability of competing MVPDs to challenge exclusive arrangements between cable operators and vertically-integrated programmers where they prove to be anticompetitive. These agreements could still be challenged under the "unfair

---

30/ *See 2007 Extension Order & NPRM* ¶¶ 18-19.

competition" prong of the program access rules,[31/] but the complainant would be required to show that the challenged arrangement causes competitive harm.[32/] Establishment of the petition mechanism described here would, however, limit the per se exclusivity ban to markets where it is a competitive necessity, a result that more closely adheres to the legal standard for application of the ban set forth under section 628(c). It would thereby expand the number of areas in which competition among MVPDs is governed by market forces and consumer preferences, rather than government regulation.

II. THE FCC HAS NO LEGAL AUTHORITY TO EXTEND THE BAN TO TERRESTRIALLY-DELIVERED HD PROGRAM OFFERINGS

The *Notice* seeks comment on whether the program access rules should apply to terrestrial programming generally and, more specifically, whether those rules "should apply to all feeds of the same programming, *including both standard and HD feeds*, regardless of whether one feed is delivered terrestrially."[33/] The Commission has repeatedly ruled that section 628 does not apply to terrestrially-delivered programming, and there is no basis for the Commission to reverse its long-standing position.[34/] The Commission likewise has no authority to extend the program access rules to terrestrially-delivered HD offerings.

31/ 47 U.S.C. § 548(b).

32/ *See* 47 C.F.R. § 76.1003(c)(7); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-265, First Report and Order, 8 FCC Rcd. 3359, ¶ 41 & n.26, ¶ 49 & n.43 (1993).

33/ *2007 Extension Order & NPRM* ¶¶ 116-17 (emphasis added).

34/ *See Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977) ("This court emphatically requires that administrative agencies adhere to their own precedents or explain any deviations from them."); *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 655, 657-58 (D.C. Cir. 1994) (reversing and remanding agency order for failing to provide substantial explanation for departing from its own precedent).

A. The Program Access Rules May Only Be Applied To Satellite-Delivered Cable Programming.

The plain language of the program access provisions of section 628 of the Communications Act limits their reach to programming that is delivered by satellite,[35/] and the Commission has so ruled on multiple occasions.[36/] The Commission also has concluded that the unfair competition provision of section 628(b) "cannot be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate."[37/] As the Commission has previously noted, "[A] practice permitted under the

---

35/ 47 U.S.C. § 548(b).

36/ *DirecTV, Inc. v. Comcast Corp.*, Memorandum Opinion and Order, 13 FCC Rcd. 21822, ¶ 25 (1998) (noting Congress's "specific intention to limit the scope of [Section 628] to satellite services"); *EchoStar Communications Corp. v. Comcast Corporation*, Memorandum Opinion and Order, 14 FCC Rcd. 2089, ¶ 21 (1999) (noting that "the correct reading of section 628(c) is that the provisions . . . apply to satellite cable programming" only) ("*EchoStar 1999 Order*"); *RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc. et al.*, Memorandum Opinion and Order, 14 FCC Rcd 17093, ¶ 25 (1999) ("In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically-integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered"); *DirecTV, Inc. and EchoStar Communications Corp. v. Comcast Corp.*, Memorandum Opinion and Order, 15 FCC Rcd. 22802, ¶ 12 (2000) (holding that a terrestrially-delivered service is "outside of the direct coverage of Section 628(c)"); *RCN Telecom Services of New York, Inc., et. al. v. Cablevision Systems, Inc. et al.*, Memorandum Opinion and Order, 16 FCC Rcd. 12048, ¶¶ 14-17 (2001) ("*RCN 2001 Order*") (rejecting arguments that Section 628 may be applied to terrestrially-delivered programming); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, CS Docket 01-290, Report and Order, 17 FCC Rcd. 12124, ¶ 73 (2002); *Everest Midwest Licensee v. Kansas City Cable Partners and Metro Sports*, Memorandum Opinion and Order, 18 FCC Rcd. 26679, ¶ 7, n. 34 (2004) ("*Everest Midwest 2004 Order*") ("By its express terms, Section 628 of the Communications Act does not apply to terrestrially-delivered services."); *2007 Extension Order & NPRM* ¶ 78.

37/ *EchoStar 1999 Order* ¶ 29. *Cf. 2007 Extension Order & NPRM* ¶ 116 (asking whether Section 628(b) authorizes the Commission to extend program access to terrestrially-delivered programming).

Communications Act and the Commission's rules cannot, without more, form the basis of a claim of unfair competition" under Section 628(b).[38/]

The specific limitation of section 628 to satellite-delivered cable programming bars the Commission from using regulatory authority granted under other provisions of the Communications Act to extend the reach of program access to terrestrially-delivered programming.[39/] The express congressional designation of the category of programming covered by section 628 -- vertically integrated, satellite cable programming -- precludes construing the Communications Act to authorize subjecting other non-designated categories, such as terrestrial programming, to the constraints of the program access provisions.[40/] Because section 628 covers

38/ *EchoStar 1999 Order* ¶ 29.

39/ *Cf. 2007 Extension Order & NPRM* ¶ 116 and n.515. *Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005) (agency could not use general rulemaking authority to expand more limited grant of marketing exclusivity delineated in specific statutory provision); *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area"); *Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) ("[W]e have not allowed the general grant of [agency] rulemaking power . . . to trump the specific provisions of the Act.").

40/ *See, e.g., Nat'l Mining Ass'n v. Dep't of Interior* 105 F. 3d 691, 694-95 (D.C. Cir. 1997) (general rulemaking provisions in statute "do not permit [agency] to trump Congress' specific statutory directive in" Act and "regulate those not covered by" statutory provision); *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 916 n.3 (3rd Cir. 1981) (Congressional intention to exclude certain class of persons from coverage under statute precluded agency from using regulatory authority to subject to statute a member of the excluded category). *See also Arc Ecology v. United States Dep't of the Air Force* 411 F.3d 1092, 1100 (9th Cir. 2005) ("[O]missions are the equivalent of exclusions when a statute affirmatively designates certain persons, things, or manners of operation."); SUTHERLAND STAT. CONST. § 47.23 ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.").

only satellite programming, the Commission lacks the authority to extend program access jurisdiction to terrestrial programming.[41/]

Nor is there any basis for concluding that access to terrestrial programming can be ordered pursuant to section 706 of the Telecommunications Act of 1996 because it is necessary for a viable video offering and therefore a prerequisite for broadband deployment.[42/] As a threshold matter, section 706 "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods."[43/] It simply "directs the Commission to use the authority *granted in other provisions* . . . to encourage the deployment of advanced services."[44/] Since the Commission has no independent authority to order access to terrestrially-delivered programming, such authority cannot be found in section 706.

Even if section 706 conferred such authority, marketplace developments make clear that the exclusion of terrestrial programming from the ambit of the program access requirements in no way inhibits broadband investment. Verizon and AT&T each are investing billions of dollars in order to deploy broadband network infrastructure to nearly 50 million homes.[45/] These substantial investments were made even though both Verizon and AT&T have been well aware that the Commission has declined to extend the program access rules to terrestrial programming. Likewise, neither DirecTV nor EchoStar enjoys guaranteed access to any terrestrial

---

41/ *RCN 2001 Order* ¶ 18 (agreeing that because section 628 "does not by its terms apply to terrestrially-delivered programming" reliance upon ancillary jurisdiction to extend scope of provision is inappropriate).

42/ *Cf. 2007 Extension Order & NPRM* ¶ 116.

43/ *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, 13 F.C.C.R. 24011, 26044 (1998).

44/ *Id.* at 24045 (emphasis added).

45/ *See Verizon to Pump $18B Into FiOS by 2010*, LIGHT READING (Sept. 27, 2006). *See also supra at nn.* 21-27.

programming. As the second and fourth largest multichannel video programming distributors (MVPDs) in the country respectively, DirecTV and EchoStar have demonstrated clearly that access to terrestrially-delivered cable-affiliated programming is not necessary "to offer a viable video service."[46/]

B. The FCC Has No Authority To Extend The Program Access Rules To Terrestrially-Delivered HD Programming.

The Commission does not have the authority to apply the program access rules to terrestrially-delivered HD programming, even if the same or similar programming in SD or analog format is delivered by satellite.[47/] Cable-affiliated programming that is made available to cable operators for distribution to their subscribers is only subject to program access if it is transmitted via satellite -- irrespective of whether it is an HD, SD, or analog signal, and irrespective of how other signal formats of that programming are distributed.[48/]

The *Notice* asks specifically "whether shifting the HD feed of vertically integrated cable programming to terrestrial delivery is an unfair method of competition or an unfair or deceptive act in violation of Section 628(b) of the Communications Act."[49/] But the Commission already has faced this question and answered it in the negative:

> EchoStar's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to such service. We find no evidence in Section 628 that Congress intended such a result. Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that

---

46/ *Cf. 2007 Extension Order & NPRM* ¶ 116.

47/ *2007 Extension Order & NPRM* ¶ 117.

48/ *Cf. Everest Midwest 2004 Order* ¶ 7, n.34 (2004) ("The Commission has previously found that terrestrially-delivered services are not providing satellite cable programming even though some of the content thereof is received by satellite.").

49/ *2007 Extension Order & NPRM* ¶ 117.

program access obligations remain with a programming service that has been so moved.[50/]

Applying the program access rules to terrestrially-delivered HD programming not only would contravene Commission precedent, it also would conflict with the holding of the D.C. Circuit Court of Appeals in *EchoStar v. Federal Communications Commission.*[51/] In that case, the D.C. Circuit ruled that a valid business reason for a programmer's decision to utilize terrestrial delivery "necessarily precluded holding" that a violation or evasion of the program access rules had taken place.[52/]

Subjecting terrestrially-delivered HD programming to section 628 simply because the same or similar programming is available in satellite-delivered SD or analog is likewise precluded by the Congress's express determination to limit the program access rules to satellite-delivered programming. A vertically-integrated cable programmer's otherwise lawful business decision -- such as opting to utilize terrestrial facilities for the distribution of certain programming -- does not become unlawful (or unfair or deceptive) merely because it has the

---

50/ *EchoStar 1999 Order* ¶ 28.

51/ *EchoStar Commc'ns Corp. v. FCC*, 292 F.3d 749 (D.C. Cir. 2002). The Commission's authority to police "evasions" of its program access rules is by no means settled. Where Congress meant to include authority to prevent "evasions" of provisions of the 1992 Cable Act, it did so explicitly. In section 623(h) of the Act (related to rate regulation), enacted simultaneously with section 628, Congress provided that "the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions . . . of the requirements of this section." 47 U.S.C. § 543(h). The grant of specific authority to the Commission in section 623 to police evasions of the rate regulation rules militates against a conclusion that Congress invested the Commission with such authority in Section 628. *See, e.g., Moshe Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1990); *Russello v. United States*, 463 U.S. 16, 23, 78 (1983). In prior program access cases involving terrestrially-delivered services, the Commission has not resolved the legal question of whether it has such power, but instead assumed such authority and then ruled it unnecessary to exercise any such assumed power on the facts presented. The D.C. Circuit likewise never confronted the threshold question of whether the Commission has authority to regulate "evasions" of section 628.

52/ *EchoStar Commc'ns Corp.*, 292 F.3d at 755.

effect of exempting that programming from regulation under section 628. There are "many occasions on which persons, without violating any law, may structure transactions in order to avoid the impact of some regulation or tax."[53] Neither Cablevision nor any other cable operator is under a statutory obligation to ensure that any and all programming they create must become or remain subject to the constraints of section 628 in perpetuity.

III. THE COMMISSION SHOULD ADDRESS BROADCASTER ABUSES OF THE RETRANSMISSION CONSENT PROCESS

The *Notice* describes concerns raised by numerous cable operators regarding the retransmission consent process and seeks comment on the "current status of carriage negotiations in today's marketplace."[54] The problems inherent in the retransmission consent scheme are all too well known. Broadcasters have significant leverage when negotiating with cable operators over retransmission because both know that many MVPD subscribers demand access to local broadcast network programming as part of the cable service. Increasingly, broadcasters have abused this leverage to demand compensation for carriage far in excess of what Congress contemplated in 1992. Cablevision reiterates its view that the Commission should examine the appropriateness of such demands and consider steps to redress these abuses.

Congress enacted retransmission consent as part of a statutory scheme to ensure that local stations were fairly compensated so that they could remain economically viable.[55] The

---

53/ *Ratzlaf v. United States*, 510 U.S. 135, 145 (1994) (internal quotation marks and internal citations omitted). *See also United States v. Ismail*, 97 F.3d 50, 57 (4th Cir. 1996) ("Law abiding citizens frequently structure transactions to avoid a report, regulation, or tax without violating the law.").

54/ *See 2007 Extension Order & NPRM* ¶¶ 121-128.

55/ 47 U.S.C. 521 nt.(a)(16), (19). *See also* 138 CONG. REC. S 562 (daily ed., Jan. 29, 1992) (statement of Sen. Inouye) (noting expectation that retransmission rights would be exercised by "broadcasters -- and I am speaking of local broadcasters, not NBC in New York or CBS in New York or ABC in New York; I am talking about channel 9 here, channel 4, or channel 7. . . . [Retransmission consent] permit[s] local stations, not national networks, as I have indicated, to legislative history of the retransmission consent statute demonstrates that Congress expected many broadcasters to consider the benefits of cable carriage alone to be sufficient compensation.[56/] Congress anticipated that broadcasters seeking additional compensation would negotiate modest demands, such as joint marketing or the right to program an additional channel on the cable system.[57/] Instead, of course, the demands that have emerged as commonplace in the retransmission consent marketplace have far exceeded Congress's expectations.[58/] The Commission should take steps to eliminate the abuse of the retransmission consent process.

---

control the use of their signals."); "Cable Television Regulation," Hearings before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, House of Representatives, 102d Cong., 1st Sess. (June 27, 1991), at 753 (statement of NAB President Eddie Fritts) (retransmission consent would mean "that stations and cable operators at the local level will negotiate a contract to provide our signals on cable systems" and that "any consideration" exchanged would "flow from such a local marketplace negotiation"); 138 CONG. REC. S 14248 (daily ed., Sept. 21, 1992) (statement of Sen. Gorton) (retransmission consent is designed to "strengthen local television stations so that they can maintain their ability to provide news, sports, weather, other local programming, and network programming in competition with cable systems").

56/ S. Rep. No. 102-92, 102d Cong., 1st Sess. (June 28, 1991) at 35-36.

57/ *Id.* While Congress contemplated that some stations would demand carriage of new programming services as compensation for retransmission consent, its objective of strengthening local stations strongly suggests that it expected such programming to be originated by local stations rather than national services owned by the broadcast networks.

58/ *See, e.g., EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 15070, ¶¶ 15-19 (2001) (describing retransmission consent dispute in which the broadcaster demanded carriage of multiple affiliated broadcasters and payments for those broadcasters as a price of its retransmission consent); *see also Mediacom Comm. Corp. v. Sinclair Broadcasting Group*, Memorandum Opinion and Order, 22 FCC Rcd, 35 ¶¶ 6-8 (in which Sinclair demanded that Mediacom carry all 22 of Sinclair's broadcast stations in the DMA at issue).

CONCLUSION

For the reasons discussed, the Commission should adopt a more granular test that enables cable operators to seek relief from the exclusivity ban in competitive markets. It should not extend the program access rules to terrestrially-delivered programming, including terrestrially-delivered HD programming, regardless of whether such HD programming is the same or similar to SD programming delivered via satellite.

Respectfully submitted,

Howard J. Symons
Christopher J. Harvie
Tara M. Corvo
Ernest C. Cooper
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 434-7300

Michael Olsen
Vice President - Legal Regulatory Affairs
Cablevision Systems Corporation
1111 Stewart Avenue
Bethpage, NY 11714
(516) 803-2583

January 4, 2008

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 4th day of January 2008, the foregoing Comments of Cablevision Systems Corp. was filed electronically through the FCC's Electronic Comments Filing System (ECFS) and copies were served on the following as indicated:

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
marlene.dortch@fcc.gov
VIA ELECTRONIC MAIL

Steven Broeckaert
Media Bureau, Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
steven.broeckaert@fcc.gov
VIA ELECTRONIC MAIL

David Konczal
Media Bureau, Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
david.konczal@fcc.gov
VIA ELECTRONIC MAIL

Katie Costello
Media Bureau, Policy Division
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
katie.costello@fcc.gov
VIA ELECTRONIC MAIL

Best Copy & Printing, Inc. (BCPI)
Portals II
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com
VIA ELECTRONIC MAIL

Ernest C. Cooper